NOTE.—The single point decided in this case has, we think, long been anticipated in the practice in condemnation proceedings in this State—that is, that before such proceedings can be instituted, effort must first have been made, without success, to agree upon terms with the land-owner. A case came under the writer's observation some years ago, where a "boom" land company needed a certain small parcel of land upon which to rest an abutment for a viaduct by which intending purchasers were to reach the phenomenally valuable lots held for sale by the company. The owner—a shrewd son of Erin, who "knew the law," and who knew further that the land company's boom could not brook delay,—transferred the *locus in quo* to his daughter, and generously sent the latter for a trip to the "Ould Counthry," where she would be beyond the reach of early propositions of purchase. The effect was the balking of condemnation proceedings, with the result that Pat named his own terms—terms which even in boom days of 1890 might fairly be called somewhat high.

FIRST NATIONAL BANK OF ROANOKE v. TERRY'S ADM'R.*

Supreme Court of Appeals: At Richmond.

February 7, 1901.

1. INSURANCE—*Insurable interest—Debtor and creditor—Limit of recovery.* A creditor may insure the life of his debtor, or may acquire, by assignment, a policy on his life after it has been issued to the debtor. The interest of the creditor in the policy, however, will be limited to the amount of the debt at the time of the death of the assured, together with such premiums as the creditor has paid to preserve the policy, with interest thereon.
2. LIFE INSURANCE—*Assignment by debtor to creditor—Terms of assignment—Limit of recovery.* It is immaterial whether the assignment of a life policy by a debtor to his creditor is absolute and unconditional, or is collateral for the amount of the debt. In either case, equity will regard the assignment as only a collateral security.
3. EVIDENCE—*Corporation as party to contract—Death of other party—Competency of agent of corporation.* Bank directors are competent witnesses to testify in behalf of the bank in an action by the bank against a third person, although they were the agents of the bank who negotiated the transaction in suit with the third party, and the latter is dead.

Appeal from a decree pronounced by the Circuit Court of the city of Roanoke, in a suit in Chancery, wherein the appellee was the complainant, and the appellant was the defendant. *Reversed.*

The opinion states the case.

Thomas W. Miller, for the appellant.

Scott & Staples, for the appellee.

*Reported by M. P. Burks, State Reporter.

BUCHANAN, J., delivered the opinion of the court.

Peyton L. Terry on the 29th day of July, 1896, assigned to the First National Bank of Roanoke, all his right, title, and interest in two policies of insurance on his own life for $5,000 each, issued, respectively, August 7, 1886, and September 14, 1886, both payable to his personal respresentatives or assigns, within sixty days after satisfactory proofs of his death had been furnished to the insurance society.

At the time of the assignment, the insured was indebted to the bank in the sum of $5,000, for money loaned, and was bound as guarantor, with one J. A. Jamison, on two notes, made by the P. L. Terry Milling Company, one for $5,200, and the other for $100, held by the bank. Terry was then in a failing condition, and the bank was pressing him for a settlement. At his instance, it appointed two of its directors as a committee to confer with him to see what arrangement could be made as to his liability. He proposed that he would assign to the bank the two life insurance policies, which were then held as collateral by the American Deposit and Loan Company to secure a debt of $1,128.60 which he owed it, if the bank would pay that debt, and discharge him from his indebtedness to it. This proposition was accepted by the bank. The bank paid the debt due from Mr. Terry to the American Deposit and Loan Company, which held the policies of insurance at the time they were assigned to the bank, and obtained possession of them. It paid the premiums on the policies until Mr. Terry's death, in the year 1898, when it collected the policies in full from the insurance company, and appropriated the proceeds to its own use, and refused to account to Terry's estate for any part thereof. Thereupon, this suit was brought by his personal representative to recover the sum collected by the bank, less the premiums paid by it, upon the ground that the assignments were illegal, and should be declared void *in toto*.

There is nothing in the record to show that either the insured or the appellant had any other object in view when the assignments were made than to settle or secure the indebtedness which the insured was liable for to the bank.

The law permits creditors, as well as others who have an interest in the life of another, to become the owner of an insurance policy on the life of such other person, either by contracting with the insurance company, or by contract made by the party whose life is insured, or by assignment of the policy after it is issued. If the interest in the life of the insured is of a definite character, as that of a creditor, the

interest of the holder of such a policy will be limited to the amount of such liability at the time of the death of the insured, together with such premiums as the creditor has paid to preserve the policy, with interest thereon, and the residue or remainder of the policy will be the property of the party insured. *Roller* v. *Moore*, 86 Va. 512; *Long, &c.* v. *Britania Company, &c.*, 94 Va. 594; *Beatty* v. *Downing*, 96 Va. 451; *New York Life Ins. Co.* v. *Davis*, 96 Va. 737; *Tate* v. *Building Ass'n*, 97 Va. 74 (1 Va. Sup. Ct. Rep., 304).

The extent of the interest which a creditor can acquire in a policy of insurance on the life of his debtor being thus limited by the policy of the law to prevent speculation in insurance in human life, it is wholly immaterial whether the policies were assigned as collateral security for the amount of the indebtedness, or by an absolute bill of sale. In either case the result is the same, and equity will regard the assignment, in legal effect, as a collateral security in the one case as in the other. *Helmitage's Admr.* v. *Miller*, 76 Ala. 183, 188; *Cawthorne* v. *Perry*, 13 S. W. R. 268 (Texas); 4 Joyce on Ins., sec. 3488.

The next question is what indebtedness was covered by the assignment.

The counsel for appellee insist that the liability of Mr. Terry, as guarantor on the P. L. Terry Milling Company note, did not enter into the transaction when the policies were assigned, and that the subsequent conduct of the bank shows this. The terms of the agreement between the parties were not reduced to writing, but the positive testimony of the two directors (who were clearly competent witnesses, *Mut. Life Ins. Co.* v. *Oliver*, 95 Va. 445), is that it embraced all of Mr. Terry's indebtedness to the bank, and the president of the bank testified that the bank and Mr. Terry, with whom he had a conversation after his proposition had been accepted, so understood it. No witness testifies to the contrary, and the conduct and acts of the bank relied on to overcome that positive testimony are wholly insufficient to do so. The acts of the bank most relied on to show that the indebtedness of Mr. Terry, as guarantor, was not embraced in the transaction, were payments made to the bank by him and his trustees, after the assignment of the policies of insurance, which were credited on the notes which he had guaranteed. Unexplained, these payments would tend very strongly to sustain the appellee's contention. It appears, however, that Mr. Terry and Mr. Jamison owned all, or practically all, of the stock of the P. L. Terry Milling Company, the maker of the guaranteed notes; that its property had been sold and conveyed

to another corporation, known as the Roanoke Grocery and Milling Company, in which they were large stockholders, and that in consideration of the sale and conveyance of the P. L. Terry Milling Company property to the Roanoke Grocery and Milling Company, fully paid up stock was issued by the last-named company to Terry and Jamison. Messrs. Terry and Jamison, the owners of the stock of the P. L. Terry Milling Company, having sold and conveyed its property to the Roanoke Grocery and Milling Company, and received the consideration therefor in the paid-up stock of the latter, felt bound to make some provision for the payment of the debts of the former company. To this end, they undertook to pay to the P. L. Terry Milling Company a sum sufficient to satisfy its indebtedness to the bank, and each gave his note payable to that company for his share of its indebtedness. Terry deposited with his note (which was for $2,239.70) as collateral to secure its payment, twenty-five shares of his stock of the Roanoke Grocery and Milling Company. These notes, together with the collateral attached, were handed by Jamison, the secretary and treasurer of the P. L. Terry Milling Company, to the president of the bank, but not as collateral to the notes of the P. L. Terry Milling Company held by the bank.

This being the condition of things when Terry assigned his policies of insurance to the bank, he continued to make payments on his notes to the P. L. Terry Milling Company. Jamison, secretary and treasurer of that company, states that those payments were made to him; that he credited them on the note for $2,239.70 made by Terry to the P. L. Terry Milling Company, and that he paid the same, together with funds of his own, to the bank as discounts or curtailments on the P. L. Terry Milling Company debt held by the bank. The trustees, in the general assignment made by Terry for the benefit of his creditors, with the assent of Jamison, the secretary and treasurer of the P. L. Terry Milling Company, and of Mr. Trout, the president of the bank, sold the twenty-five shares of stock deposited with Terry's note for $2,239.70 for $750, and paid that sum to the bank. It was credited on the $2,239.70 note, and also upon the note of the milling company to the bank. It thus appears very clearly that those payments by Terry and his trustees were not made on account of his liability as guarantor, but were made on account of Terry's indebtedness to the P. L. Terry Milling Company, and credited thereon, and then credited on the debt of the milling company to the bank.

It follows from what has been said, that the appellant should be

charged with the sum of $10,000, the proceeds of the insurance policies, as of January 16, 1899, the date the same was paid to it, and that it should be credited with Terry's note to it for $5,000, dated May 28, 1896, with legal interest thereon from the time it became due and payable until January 16, 1899; with the sum of $1,128.60, the amount paid by the appellant to the American Deposit and Loan Company, with legal interest thereon from the day of payment until January 16, 1899; with the sum of $1,482, the aggregate amount of the premiums paid by the appellant, with legal interest on the amount of each of said premiums from the date of its payment until January 16, 1899.

The court is further of opinion that the residue of the said $10,000 should be credited on that portion of the indebtedness of the P. L. Terry Milling Company for which P. L. Terry, deceased, was liable as guarantor, as of the 16th day of January, 1899, so far as it may be necessary to pay the same, and that to the extent of such payment the appellee should be subrogated to all the rights and remedies which the appellant may have against the said P. L. Terry Milling Company or its assets, on account of that debt, and if after crediting all these sums upon the said $10,000, any balance thereof should remain in the appellant's hands, it should pay the same over to the appellee, with interest thereon from January 16, 1899, until paid.

The decree complained of will be reversed and set aside, and the cause remanded to the Circuit Court for further proceedings to be had in accordance with the views expressed in this opinion. *Reversed.*

NOTE.—One of the most difficult branches of the law of life insurance is that of insurable interest, especially in connection with the assignment of policies, and policies issued to creditors on the life of debtors.

The doctrine of the principal case—that where the assignment is merely to secure a debt, the insured or his representative is entitled to the residue after the payment of the debt and reimbursing the creditor for premiums paid—is probably nowhere controverted.

The *dictum* in the case, however—uttered in several previous cases in this State—that where a creditor originally takes out a policy on the life of his debtor, his recovery will likewise be limited to the amount of his debt at the time of the death of the debtor and premiums paid, is a doubtful proposition, and it is to be hoped that before the court finally commits itself to the doctrine, further investigation will be made.

The life insurance contract differs widely from that of fire or marine insurance. The latter are mere contracts of indemnity against losses not sure to happen. For a small premium the insurer takes the risk that the loss will not happen—having determined by experience at what rate he can afford the insurance, so that

premiums derived from the large number of risks which result in no loss, may enable him to pay the few losses that do occur, and yet leave a profit.

But the life insurance contract is not one of indemnity. Here the loss is sure to happen in every case. The rates are therefore so adjusted that the insurer may receive from the insured in every case—averaging one with another—more than the certain loss in each case. Life insurance therefore is more in the nature of an investment—whether viewed from the standpoint of the insurer or the insured. It is in substance like the purchase of an annuity—the insured agreeing, in consideration of a sum in gross, payable at death, or at the end of the stipulated period, to pay to the insurer an annuity in the shape of premiums. The vital difference between life insurance and indemnity insurance is well stated by Mr. Justice Clifford, in *Phoenix etc. Ins. Co.* v. *Bailey*, 13 Wall. 616. See also 1 Joyce on Ins. 26; 3 Va. Law Reg. 832.

The law requires that the beneficiary who takes out such a policy, shall have an interest in the life of the insured, in order to prevent wagering. But after a valid contract is thus made, the fact that in the subsequent course of events this interest ceases, does not convert the original valid contract into an invalid one. The inquiry is, Was the contract valid in its inception? If so, it continues valid, notwithstanding the cessation of interest on the part of the beneficiary in the life of the insured. Hence, where a creditor has taken out a policy on the life of his debtor for the amount of his debt, his right to recover the amount from the insurer is in no wise affected by subsequent payment of the debt. The leading case on this subject is *Dalby* v. *India and London Life Ass. Soc.*, 15 C. B. 365. The principle is also affirmed in *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U. S. 457; *Rawls* v. *Am. Mutual Life Ins. Co.*, 27 N. Y. 282; *Scott* v. *Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192; *Corson's Appeal*, 113 Pa. St. 438, 57 Am. Rep. 479; *Mowry* v. *Home Ins. Co.*, 9 R. I. 346. See also *Long* v. *Meriden etc. Co.*, 94 Va. 594, 603.

That in reason, the payment of the debt, or cessation of insurable interest otherwise—where the creditor has himself taken out the policy and paid the premiums —should not affect the right of the creditor to claim the full amount of the policy, appears when it is considered that every such creditor himself assumes the personal risk of being required to pay to the insurer, in the shape of premiums, an amount larger than the face of the policy. Taking one case with another, holders of life policies do in fact pay a larger amount in premiums than they receive back as proceeds of their policies—else life insurance companies would go out of business. Having, then, assumed this risk of loss by an excess of payments over receipts, it is inequitable that the creditor should not enjoy whatever benefits that accrue from the investment. The debtor is not entitled to the proceeds, as he made no contract whatever with the company. He is not bound to make good to the creditor any excess of payments over receipts, and is not therefore privy to the contract expressed in the policy.

Not only is the creditor permitted in such case to receive the amount of the policy (although the debt has been paid since the policy was issued), where the policy does not exceed the debt, but many of the courts, with good reason, hold that the policy need not be limited to the amount of the debt, provided only that the disproportion between the debt and the amount of the policy be not so great as to indicate lack of good faith and an intention to speculate upon the debtor's life.

For example, if A owes B a debt of $500, there is, in ordinary cases, no good reason why B may not take out a policy for considerably more than this amount on A's life. Not only is B interested in securing the principal, but the interest, which may at the debtor's death have equalled or exceeded the principal. Furthermore the premiums which B pays may—and will, in case A lives out his expectation of life, since the rates are fixed to accomplish this very result—in themselves exceed the face of the policy. B is interested therefore in securing (1) The principal, (2) The interest thereon, possibly exceeding the principal, and (3) The premiums, possibly, and, in average cases, certainly, exceeding the face of the policy. Hence in reason, and by authority, a creditor in insuring the life of his debtor is not confined to the amount of the debt. See *Ritter* v. *Smith*, 70 Md. 261, 2 L. R. A. 844; *Grant* v. *Kline*, 115 Pa. St. 618; *Ulrich* v. *Reinoehl*, 143 Pa. St. 238, 13 L. R. A. 433; *Amick* v. *Butler*, 111 Ind. 578, 60 Am. Rep. 722; Bliss on Life Ins. 31. A contrary view is taken in *Exchange B'k* v. *Loh*, 104 Ga. 446, 44 L. R. A. 372—Little, J., concurring specially, and arguing in a strong opinion for the view above expressed.

See further on this subject, 5 Va. Law Reg. 801.

MANUEL, ADM'R, v. NORFOLK & WESTERN RY. CO.

Supreme Court of Appeals: At Richmond.

January 31, 1901.

1. STATUTE OF LIMITATIONS—*Death by wrongful act—Demurrer.* Where the declaration in an action for death by wrongful act shows on its face that the death occurred more than twelve months before action brought, advantage may be taken of the limitation by demurrer.
2. STATUTE OF LIMITATIONS—*Death by wrongful act—Second action after voluntary non-suit—Code, secs. 2919, 2934.* Neither the provisions of Code, sec. 2919, as amended, nor of sec. 2934, as amended, are applicable to a second action for death by wrongful act, where the first action was brought in due time, but resulted in a voluntary non-suit.

Upon a petition for a writ of error to a judgment of the Circuit Court of Warren county. *Denied.*

Per curiam: The plaintiff's decedent is alleged to have lost his life by the negligence of the defendant on the 27th day of July, 1898. His administrator qualified on the 16th day of January, 1899, and instituted an action for damages for the killing on the 19th day of the same month. There was a mistrial at the February term of the court. The case was continued at the May term. At the October term of the court, a juror was withdrawn, and upon motion of the plaintiff he